Supreme Court, U.S.
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NO. 90-1754

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHARLES DEEDS,
Petitioner

v.

JOE JOHNSON, ET AL.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER THE STATUTE OF LIMITATIONS FOR AN EMPLOYMENT HARASSMENT SUIT BEGINS TO RUN ON THE DATE OF PETITIONER'S RESIGNATION LETTER OR THE DATE THE RESIGNATION LETTER BECOMES EFFECTIVE?

LIST OF ALL PARTIES TO THE PROCEEDINGS

CHARLES DEEDS—Petitioner, former employee of the City of Houston.

JOE JOHNSON—Respondent, former employee of the City of Houston.

AUBREY LA FARGUE—Respondent, present employee of the City of Houston.

AL PLIODZINSKAS—Respondent, former employee of the City of Houston.

THE CITY OF HOUSTON, TEXAS—Respondent, a municipal corporation.

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STATEMENT OF THE CASE

Petitioner has stated the facts accurately; however, the issue currently before this Court is extremely narrow. This is a statute of limitations case where three dates are at issue: (1) June 11, 1987, the date of Petitioner's letter of resignation; (2) July 1, 1987, the effective date of Petitioner's resignation letter; and (3) June 20, 1989, the date this suit was filed in the District Court.

Both the District Court and the Court of Appeals for the Fifth Circuit concluded that in this case the date which activates the two year statute of limitations for an employment harassment suit under 42 U.S.C. §§ 1983, 1985, 1986 and 1988[1] is June 11, 1987, the date of Peti-

1. Apparently before this Court the Petitioner abandons all statutory claims except those under § 1983. See Petition at 1.

tioner's resignation letter. This date was chosen because this document triggers the Petitioner's alleged constructive discharge, the last factually-supported act of harassment contained in Petitioner's pleadings. Petitioner offers no other event or allegation occurring after June 11, 1987 to maintain his theory of continuous harassment or to raise an issue of fact requiring reversal. Federal law mandates that continuous harassment be supported by fact-specific pleadings. Petitioner failed in providing those critical facts in his pleadings.

REASONS FOR DENYING THE WRIT

This case is not one meriting review by this Honorable Court. Petitioners have not established any of the considerations set forth in this Court's Rule 10. The decision rendered by the Court of Appeals is not in conflict with any other decision of another Court of Appeals or of this Court. This case presents no important legal issue that this Court has not decided but should decide. The actions of the lower courts were not of such a nature as to call for an exercise of this Court's power of supervision.

ARGUMENT

THE STATUTE OF LIMITATIONS FOR AN EMPLOYMENT HARASSMENT SUIT UNDER 42 U.S.C. § 1983 BEGINS TO RUN WHEN THE EMPLOYEE HAS NOTICE THAT A DISCRIMINATORY ACT HAS OCCURRED WHETHER THAT ACT IS A DISCRETE INSULAR ACT OR ONE IN A CHAIN OF CONTINUOUS HARASSMENT. THESE ACTS MUST BE PLEAD AND SUPPORTED BY PROOF.

To support a continuous violation theory for an employment harassment suit filed under 42 U.S.C. § 1983, petitioner must show that discriminatory acts occurred until the effective date of his resignation.

Much of the confusion generated by this case comes from two overlapping, yet distinct analyses of the continuous violation theory of employment discrimination. Petitioner is arguing the continuing violation theory of harassment presented in the seminal statute of limitations case, *Delaware State College v. Ricks,* 449 U.S. 250 (1980). The first analysis, and point of departure for judicial review, involves the allegations contained in a particular complainant's pleadings. If no factually-supported allegations are made to show that continuous harrassment occurred until the termination of employment, the Court may not consider them. This was the death knell for Ricks' argument; the allegations which would have extended the statute of limitations were not contained in his complaint. The second analysis of the continuing violation theory is the notice factor integral to a Civil Rights violation: when does the claimant realize that he or she has suffered an injury? This Court, in *Ricks,* looked at the allegations and evidence proffered and concluded that "[i]n light of the unbroken array of negative decisions, the District Court was justified in concluding that the College had established its official position—and made that position apparent to Ricks—no later than June 26, 1974 [the day Ricks was told he would be offered a 1-year "terminal" contract that would expire June 30, 1975]." *Ricks,* 449 U.S. at 262.

In *Ricks,* the two analyses converged and June 26, 1974 became the trigger date because no later date was offered with evidentiary support for acts of discriminatory conduct.

It was also the date when Ricks conclusively knew that he would be denied tenure. Similarly, the analyses for the case before this Court converged and June 11, 1987 became the trigger date because it was the last date offered in Petitioner's pleadings of discriminatory conduct, and it was the date when Petitioner conclusively knew that his rights were allegedly violated through an alleged constructive discharge.

As the Appellate Court has noted in its opinion, there are various ways of interpreting the District Court's opinion, none of which requires reversal. (Petition at A-3). The *Ricks* holding is one: the Court may only review what is presented in the pleadings; if the allegations of discriminatory conduct are not in the complaint, then the Court must look at what facts are presented to determine when the complainant would have knowledge that he had suffered an injury. This is the second and somewhat overlapping view which comes with the notion of when the victim has notice that his rights have been violated; the courts have held that upon acquiring that knowledge the limitations period commences to run. See *Singleton v. City of New York,* 632 F.2d 185, 192 (2d Cir. 1980), *cert. denied,* 450 U.S. 820 (1981).

In applying those two views, the key lies in how this Court construes the time between June 11, 1987 and July 1, 1987, the time between the date of Petitioner's resignation letter and its effective date. Petitioner chose to work until June 30, 1987. Does the mere fact that he continued to be employed demonstrate that he was enduring employment harassment up until that date? Petitioner would have this Court believe, without the support of any allegations or evidence, that because he con-

tinued to work, the employment harassment continued; that because of his mere presence on the jobsite he continued to endure employment harassment. *Ricks* addresses this issue concisely: "[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination." *Ricks,* 449 U.S. at 257. Moreover, Petitioner's argument is contrary to the fundamental assumption in the concept of "constructive discharge." In a constructive discharge it is assumed that the Defendant intended to force the Plaintiff to resign, but it is illogical to assume that, having achieved that objective, the Defendant continued the same course of conduct, absent pleading and proof.

The Petitioner in *Ricks* was denied tenure but, as with many other tenure denials, was given an additional one-year contract. *Ricks,* 449 U.S. at 253. Ricks utilized the continuing violation theory of employment harassment and argued that the employment discrimination continued during that last year and until the very last day of employment. *Ricks,* 449 U.S. at 257. However, the District Court determined that the "*only unlawful employment practice alleged*" was the College's decision to deny Ricks' tenure, and that the limitations period for both claims had commenced to run on June 26, 1974, when the President of the Board of Trustees notified Ricks that he would be offered a 1-year 'terminal' contract." *Ricks,* 449 U.S. at 255. (Emphasis added.)

Petitioner's argument here is flawed in the same manner. Petitioner wants to extend the statute of limitations to include the last date of employment because harassment allegedly occurred until the moment that he left. However, as in *Ricks,* Petitioner offers no evidence, no allegations,

no facts, in his pleadings to indicate that the alleged harassment continued after June 11, 1987. The focus must be placed on what is presented in Petitioner's pleadings; if the allegations, supported with appropriate evidence, are not in the pleadings, then those allegations cannot be considered on summary judgment. As in *Ricks,* Petitioner's "argument cannot be squared with the allegations in the complaint." *Ricks,* 449 U.S. at 257.

The second analysis, focusing more on the point in time when a claimant undeniably has knowledge that his rights have been violated, is not the central issue in *Ricks.* Petitioner is correct when he states that to "[h]old . . . that a cause of action for an injury accrues on the basis of action by the victim, not of the alleged wrongdoer, is a gross misapplication of the principles set forth in [Ricks]." (Petition at 6). This statement is correct, but it is Petitioner who is misapplying the *Ricks* holding. Petitioner is confusing the two analyses and forcing the "notice" view into the *Ricks* framework, thereby misinterpreting the Court of Appeals' analysis. Ricks was denied relief because of the allegations, or lack of, in his complaint; as here, Ricks offered no other allegations in his complaint except that he was denied tenure a year before he actually ceased teaching. However, the fact that Ricks was denied tenure a year before he ceased teaching indicates that when he was denied tenure he felt, at that moment, that he had been injured. The injury was the denial of tenure and Ricks then had the burden of seeking redress. If there were other injuries occurring subsequent to the denial of tenure, then Ricks could seek redress after those events, but, as here, none were alleged. Obviously, in order to seek redress, one must have a reason

for doing so, and once that reason is determined, the claimant must take affirmative steps to remedy the injury.

The Court must look at what is in the complainant's pleadings; if the injury alleged is in the nature of a continuous violation, then the Court must look at when the instance of alleged discriminatory conduct occurred because this will indicate when the complainant had notice that he or she had been injured. Here, the last instance of alleged discriminatory conduct was Petitioner's constructive discharge.

Case law in the Fifth Circuit is well-established regarding this issue: "[t]he statute of limitations begins to run from the moment that [a claimant] has suffered an injury or has sufficient information to know that [a claimant] has been injured." *Helton v. Clements,* 832 F.2d 332, 335 (5th Cir. 1987). See also *Dumas v. Mount Vernon,* 612 F.2d 974, 978 (5th Cir. 1980), *McWilliams v. Escambia County School Bd.,* 658 F.2d 326, 330 (5th Cir. 1981); *Clark v. Resistoflex Co., Div. of Unidynamics,* 854 F.2d 762, 766 (5th Cir. 1988); *Jay v. International Salt Co.,* 868 F.2d 179, 181 (5th Cir. 1989). Other circuits are in agreement: *Singleton v. City of New York,* 632 F.2d 185, 192 (2d Cir. 1980), *cert. denied,* 450 U.S. 920 (1981); *Bireline v. Seagondollar,* 567 F.2d 260, 263 (4th Cir. 1977), *cert. denied,* 444 U.S. 842 (1979); *Dixon v. Anderson,* 928 F.2d 212, 215 (6th Cir. 1991); *Nazaire v. Trans World Airlines, Inc.,* 807 F.2d 1372, 1377 (7th Cir. 1986), *cert. denied,* 481 U.S. 1039 (1987).

Consequently, this Court said that "[i]f Ricks intended to complain of a discriminatory discharge, he should have identified the alleged discriminatory acts that continued until, or occurred at the time of, the actual termination

of his employment." *Ricks,* 449 U.S. at 257. Absent any allegations of discriminatory conduct up to and at the time of termination, the Court must look at the events chronicled in the complaint and the time they occur to determine when the Complainant had enough notice to know that he or she had been injured. Only the victim will know when he has been injured and only the victim will perceive that his rights have been violated. At that moment in time the victim must take affirmative steps to seek redress for that injury. The State of Texas has given such victims two years from that point in time to seek remedial action. See Texas Civil Practices and Remedies Code, § 16.003.

Petitioner alleges a "persistent pattern of conduct culminating in the constructive discharge." (Petition at 7). Respondents would note that four documented instances of allegedly discriminatory conduct do not a "persistent pattern" make. In Petitioner's Original Complaint, four supportable instances of allegedly wrongful conduct were offered: one transfer and two grievances, in addition to the alleged constructive discharge. The transfer occurred in January, 1986, and the two grievances occurred on August 27, 1985 and November 3, 1986, all very clearly not within the timeframe provided by the statute of limitations.[2]

The last act alleged, the constructive discharge, occurred on June 11, 1987. Petitioner had knowledge of the constructive discharge on June 11, 1987. This is clear

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2. Although the specific dates for the transfer and two grievances, and the date of the resignation letter are not contained in Petitioner's Original Complaint, they are contained in the Record at pages 74-79 and a copy of the Petitioner's resignation letter appears as Appendix B of Appellant's Brief to the Fifth Circuit.

because Petitioner wrote the letter which indicated his desire to resign and that such resignation would be effective July 1, 1987. Under the continuing violation argument, that last act, the constructive discharge, is not within the statute of limitations and, because no other act is offered for the Court's consideration, the alleged continuing violation ceases on that day. Under the notice argument, Petitioner knew that his rights had been allegedly violated on June 11, 1987; he felt he was being driven to resign because the alleged harassment was so egregious. One might even argue under the notice theory that the statute of limitations expired long before because Petitioner had knowledge as early as August 27, 1985, when he filed his first grievance.

Petitioner offers no other allegations of discriminatory conduct. Instead, in Petitioner's Original Complaint, Petitioner makes some rather sweeping assertions of being subjected to unfair criticism and disparagement of his work performance, exposing him to unsafe and hazardous working conditions, unfairly rating him in job performance reviews, imposing unreasonable conditions and unwarranted disciplinary actions upon him, and subjecting him to standards of expected performance substantially different from those of similarly situated employees. However, these allegations are not coupled with any factually specific detail nor shown to have occurred between June 11, 1987 and July 1, 1987, fatally placing Petitioner's claim outside of the applicable statute of limitations. Petitioner's flimsy litany of alleged abuse is not enough to create a "persistent pattern of conduct culminating in the constructive discharge" and therefore insufficient to support a continuous violation theory or to indicate that Petitioner did not know that he was suffering an injury until July 1, 1987.

Petitioner has emphasized the Fifth Circuit Court's statement that "the statute of limitations began to run from the date that Deeds [Petitioner] notified his employer of his resignation on June 11, 1987, not on the last day of work, *irrespective of continuing wrongful acts of the employer between those dates.*" (Petition at 7.) (Petitioner's emphasis.) This statement is clearly read out of context. The Court of Appeals is not stating that continuing wrongful acts occurred, but that even if they had occurred, *because Petitioner had knowledge on June 11, 1987* of the alleged constructive discharge, Petitioner was required to file his suit within the next two years. Even if discriminatory conduct had occurred after that date, because Petitioner possessed the knowledge that he had suffered an injury on that date, the statute of limitations for the constructive discharge began to run on June 11, 1987. (Petition at A-3-6.)

Petitioner misconstrues the case law for the continuing violation theory. *Centifanti v. Nix*, 865 F.2d 1422 (3rd Cir. 1989) involved a disbarred attorney seeking reinstatement. The Third Circuit ruled that because the attorney was suspended from the practice of law, his allegation was that of a continuing wrong. *Centifanti*, 865 F.2d at 1433. Centifanti, the attorney, was denied a means to earn a living without his license to practice law. Petitioner's situation is much different from Centifanti's; Petitioner resigned and could obtain employment elsewhere; Centifanti could literally not practice his profession. Moreover, Centifanti neither resigned nor was constructively discharged; he was disbarred for criminal charges resulting from an assault on his wife. Here, Petitioner resigned allegedly because of intolerable employment harassment. *Centifanti* fails to support Petitioner's argument.

Petitioner also utilizes *Abramson v. University of Hawaii,* 594 F.2d 202 (9th Cir. 1979), a case cited in *Ricks,* but Petitioner is unclear as to what premise this case is meant to support. Respondents agree with the language cited from *Abramson* in *Ricks,* that "[t]he proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful." *Ricks,* 449 U.S. at 258. However, *Abramson* is distinguishable from the present case because there the issue was the manner in which tenure denial was implemented. Tenure denials were routinely reconsidered and not deemed final until the President of the University had the opportunity to reconsider and declare that the decision was final. Therefore, the statute of limitations began when, after reconsideration, the President's decision was made to either grant or deny tenure. *Ricks* did not involve such a policy; routine reconsideration was not a common practice as in *Abramson. Abramson* was decided through summary judgment in the lower court and the appellate court determined that there was a fact question at issue, i.e., whether reconsideration was part of the ordinary and generally accepted tenure decision process, which should have precluded the granting of summary judgment. This factual distinction does not alter the *Ricks* holding nor does it add any authority to Petitioner's argument. Petitioner still does not allege any reason for extending the statute of limitations beyond June 11, 1987.

CONCLUSION

This case presents no significant legal issue. This Honorable Court has decided this issue in *Ricks* and there is ample and consistent precedent in applying *Ricks* throughout the Appellate Courts. Petitioner offers no unique question of law but rather muddles the issue by confusing

the dimensions of the continuous violation theory of employment harassment. Petitioner did not provide the factual support to sustain a continuing violation. Further, Petitioner had knowledge of the alleged harassment long before June 11, 1987, as evidenced by the incidents that Petitioner did choose to include in his complaint. The last incident, the alleged constructive discharge, occurred on June 11, 1987. According to case law and in conformance with Texas Civil Practice and Remedies Code § 16.003, the statute of limitations expired June 12, 1989. Petitioner filed suit on June 20, 1989. Therefore, Petitioner's claims are time-barred.

For all of the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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